SUPREME COURT, U. S.
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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-827

CYRUS T. ANDERSON, *Petitioner*

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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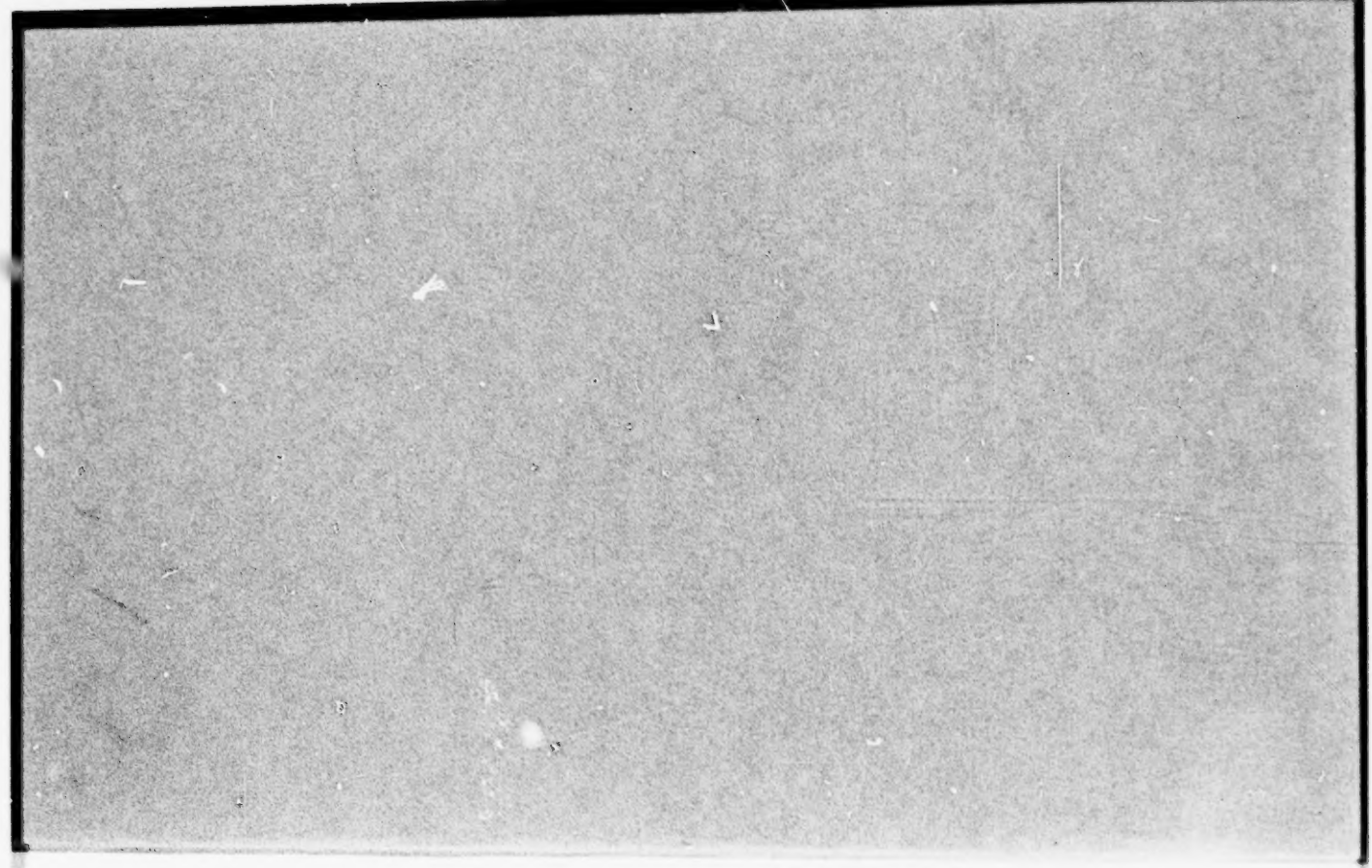

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Cyrus T. Anderson petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-42a) is not yet reported. The judgment of conviction of the district court (App. B, *infra*, p. 43a) is unreported.

JURISDICTION

The judgment of the court of appeals was initially entered without opinion on October 22, 1974, and re-entered with opinion on November 12, 1974.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court's decision to have petitioner tried before a jury consisting solely of those who volunteered to serve in the case deprived petitioner of his Sixth Amendment right to trial by an impartial jury chosen from a cross-section of the community.

2. Whether petitioner was deprived of a fair trial because of the admission into evidence, over objection, of

(a) highly prejudicial, hearsay testimony by the government's principal witness that petitioner had attempted to bribe Senator Brewster on a prior, unrelated occasion; and

(b) surprise, perjured testimony of a critical witness, whose story was revealed only on the morning the trial began.

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[1] On petitioner's motion, alleging that he was unable to prepare and file a petition for rehearing or a petition for a writ of certiorari because the court of appeals had withheld an opinion, the court issued an opinion on November 12, 1974, and an accompanying order directing that the time for post-judgment actions be calculated from that date. The court of appeals subsequently stayed issuance of the mandate until January 2, 1975, and indicated that if a petition for a writ of certiorari were filed by January 2, 1975, the issuance of the mandate would be further stayed until disposition of the petition. Rule 41(b), F.R.A.P.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed * * *.

The federal statute dealing with "Bribery of public officials and witnesses," 18 U.S.C. 201, provides in relevant part as follows:

Section 201(b)(1):

> Whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent—
>
> (1) to influence any official act;
>
> * * *
>
> Shall be fined not more than $20,000 or three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

Section 201(f):

> Whoever, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be per-

formed by such public official, former public official, or person selected to be a public official * * *

Shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

STATEMENT

Petitioner and then-Senator Daniel B. Brewster were jointly indicted for, respectively, offering and accepting bribes to influence Senator Brewster's actions, vote and decision on pending postal rate legislation, in violation of 18 U.S.C. 201 (App. 25-31). The indictment alleged that on three occasions in 1967, Senator Brewster received the sums of $5,000, $4,500, and $5,000 from petitioner and Spiegal, Inc.[2] in connection with efforts to limit proposed increases in postal rates that would adversely affect Spiegel's mail-order business (App. 25-31).[3]

Following various pre-trial motions[4] and related matters, the indictment came on for trial on October 27, 1972. At the pre-trial conference, the presiding judge advised all counsel that, because the trial would begin on the last day of the normal period of jury

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[2] Spiegel, Inc., which employed petitioner as a lobbyist, entered a plea of guilty after the trial had begun, and was severed from the further proceedings (Pet. App. A, p. 3a, fn. 7).

[3] "App." references are to the Joint Appendix filed in the court of appeals. "Tr." references are to those portions of the transcript of trial not included in the Joint Appendix.

[4] The trial judge originally dismissed the indictment as to Senator Brewster, concluding that his prosecution was barred by the Speech or Debate Clause of Article I, § 6 of the Constitution. This Court subsequently reversed that ruling. *United States* v. *Brewster*, 408 U.S. 501.

service, he would select the jurors from those members of the panel who volunteered to serve:

> Now, rather than call in a lot of jurors—that would be their last day of service normally—who would ask to be excused, and I would have to excuse them if they asked, I had the people over in the Jury Lounge ask this question, without identifying the case: We have a case starting October 30th that may take two weeks. Each of you is requested to ask that if you were chosen to serve on this jury for two weeks, would you be able to do so? And 68 of them, I believe, answered in the affirmative, all the rest of them, two or three-hundred, said no.

(App. 60). Counsel for petitioner objected to this procedure, but his further objections were summarily overruled by the trial court (App. 60-61).

The government's principal witness against Senator Brewster and petitioner was John F. Sullivan, a former aide to the Senator, who testified under a grant of immunity (App. 123-125, 205-207). Mr. Sullivan testified as to the facts surrounding the three meetings when petitioner explained the defects in the proposed legislation, and presented or promised campaign funds to Senator Brewster. Following the first of these meetings, Mr. Sullivan spoke to Senator Brewster, who allegedly

> said, well, I know Cy Anderson and back when I was a Congressman he tried to bribe me and I threw him out of my office.

(Tr. 128).

Objection was made to this hearsay and obviously prejudicial testimony (App. 128-129). The court denied a motion for a mistrial, instead cautioning the

jury that the statement was admissable "only as it relates to Senator Brewster and not as it relates to Spiegel or Anderson" (App. 129). Subsequently, however, the court ruled that the jury could consider any evidence of petitioner's "attitude towards obeying the law" in considering his guilt of the charges here.

Moreover, in closing arguments, the government again adverted to this prejudicial testimony, specificially relating it to petitioner:

> [Sullivan] said Senator Brewster told him that Mr. Anderson had come to his office and tried to bribe him and that Senator Brewster, then Congressman Brewster, had thrown him out of his office. Now that was in the late 'fifties.
>
> * * *
>
> So he [Anderson] went, he wanted [sic] to Senator Brewster, but back in 1950 he had already been to Senator Brewster and Senator Brewster had already thrown him out of his office, so what did he do? He sent Esther Coopersmith.

(App. 357-358). In this manner the court's initial instruction to relate the hearsay testimony only to Senator Brewster was effectively circumvented.

The government's other important witness was Betsey Norton. Although the joint "memorandum of conferences" which had served in lieu of discovery had indicated Mrs. Norton would testify only regarding the cashing of a check.[5], on the morning of the trial the

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[5] The memorandum stated the following regarding Mrs. Norton's proposed testimony:

> The government expects to show that Anderson sought reimbursement from Spiegel for the $5,000 and it came in the form of $5,000 check from Spiegel dated July 31, 1967 payable to the D.C. Committee for Maryland Progress. This check bears

government informed petitioner's counsel that her testimony would be that she was deeply involved in transferring funds to Senator Brewster (Pet. App. A, pp. 18a-19a). Counsel's request for a continuance to meet the completely unexpected testimony was denied (App. 78-84, 89-93).

Mrs. Norton then testified, *inter alia*, that in order to further the transfer of funds she went with petitioner to an airport in Kansas City, so that she could later identify a man named Criswell. She further testified that she never left the airport during the meeting (App. 269-270; Tr. 1657-1658). Both Criswell and petitioner testified that Mrs. Norton was not there, and a hotel receipt submitted on petitioner's motion for a new trial confirmed that Mrs. Norton had been at a Kansas City Hotel that morning (R. 87).[6]

Petitioner's defense to the indictment was, *inter alia*, that his activities involved nothing more than the legitimate and permissible efforts of a registered lobbyist to convince a member of Congress that proposed legislation was undesirable. Senator Brewster had publicly opposed higher postal rates for years, and

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the endorsement of Betsey Shipley Norton who will testify that she cashed the check and turned over the $5,000 cash to Anderson * * * in addition, the government expects to show that when Betsey Norton cashed the * * * check, Margaret Murphy was at the bank vouching for her.

(App. 41).

[6] The impact of Mrs. Norton's surprise testimony was considerably heightened by the fact that, in front of the jury, she refused to testify (App. 226-232). The jury was then taken out, and Mrs. Norton was jailed for contempt. Mrs. Norton returned to the courtroom after the government had closed its case, and the government was permitted to reopen the case to take her testimony (*Ibid.*).

petitioner had worked with him on other legislative matters. Both defendants testified that the campaign contributions were neither made nor received with any intent to influence the Senator's actions.

After being instructed by the trial judge regarding the differences between giving and accepting a bribe under sections 201(b),(c) and an illegal gratuity under section 201(f),(g) [7], the jury found petitioner guilty of bribery. Even though the government had emphasized in its case that petitioner and Senator Brewster had conspired together to give and receive the bribes (see R. 80; App. 375), the jury found Senator Brewster not guilty of receiving a bribe, but guilty of accepting an illegal gratuity.

On appeal of petitioner's conviction, the court of appeals affirmed (Pet. App. A, *infra*).[8] The court found no error in the trial judge's accepting only volunteers for the jury, emphasizing that no group was thereby "excluded" from the panel (Pet. App. A, p. 17a). The court viewed the cautionary instruction as adequate to protect petitioner from the prejudicial statement of Sullivan, and it commented that the "able" defense given petitioner belied any harm from denying a continuance to refute Mrs. Norton's testimony (Pet. App. A, pp. 23a, 32a).

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[7] The court refused to give two instructions, however, that were central to petitioner's theory that his activities on behalf of Spiegel with Senator Brewster were perfectly proper attempts to influence the Senator's vote (See Pet. App. A pp. 32a-34a).

[8] In a separate opinion, the court of appeals reversed the conviction of Senator Brewster, finding that the trial judge had been properly distinguished between the offenses of an illegal bribe, an illegal gratuity, and a legal campaign contribution. *United States* v. *Brewster*, C.A.D.C., No. 73-1305, decided August 2, 1974.

REASONS FOR GRANTING THE WRIT

This case raises an important question regarding the Constitutional validity, under the Sixth Amendmen't guarantee of an impartial jury and the Fifth Amendment's right to due process, of permitting a criminal defendant to be tried by a jury panel selected from those who have consciously volunteered to hear a major criminal trial. It thereby presents the Court with an appropriate opportunity to reconsider *Frazier* v. *United States*, 335 U.S. 497, a bare majority opinion subsequently described as "that weird and misguided decision." *Dennis* v. *United States*, 339 U.S. 162, 173 (Jackson, J., concurring). And it also involves the issue of whether the holding in *Peters* v. *Kiff*, 407 U.S. 493—that a defendant need not show actual prejudice where jury selection procedures are constitutionally invalid—should be applied to arbitrary jury selection methods not involving raciai discrimination. Cf. *White* v. *Georgia*, 414 U.S. 886 (Brennan, Douglas & Marshall, JJ, dissenting from denial of certiorari); *Ballard* v. *United States*, 329 U.S. 187, 195.

Certainly, it cannot be denied that these are vital issues, at a time when major criminal trials resulting from the Watergate and related investigation are receiving increased public attention. Jurors in these cases have been the subject of substantial publicity in the news media, and to an understandable human desire for attention, there is added in the District of Columbia the financial incentive of receiving full salary if the volunteer juror is a government employee. Such inducements to volunteer jury service and the possible resultant distortions affecting a defendant's right to trial by an impartial jury selected from a representative cross-section of the community warrant this

Court's review, both as a matter of Constitutional law and in the exercise of its supervisory power over the administration of justice in the federal courts. *McNabb* v. *United States*, 318 U.S. 332.

The need for review of this case by the Court, then, stems from the fact that "[a] fair trial in a fair tribunal is a basic requirement" of our Constitutional system. *In Re Murchinson*, 349 U.S. 133, 136. An all-volunteer system may be perfectly appropriate when the government is seeking to raise an army, but such an approach is completely improper when the government is selecting a jury. The petition for a writ of certiorari should be granted.[9]

1. The Sixth Amendment, with its express guarantee of the right to trial "by an impartial jury", and the Due Process Clause of the Fifth Amendment, have long been interpreted to require that a criminal defendant be tried by a representative jury "drawn from a cross section of the community." *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217, 220. To insure that this essential right is accorded in fact as well as theory, this Court has cautioned the lower federal courts not to

> allow the desire for competent jurors to lead them into selections which do not comport with the concept of the jury as a cross-section of the community. Tendencies, no matter how slight, toward the selection of jurors by any method other than a process which will insure a trial by a representa-

[9] While the propriety of using an all-volunteer jury involves the fairness of the tribunal, this Court should also review the manifest lack of fairness in the trial itself. The admission of and repeated references to an unrelated prior bribery attempt by petitioner are so inherently prejudicial that a new trial should have been granted.

> tive group * * * should be sturdily resisted. That the motives * * * may be of the best must not blind us to the dangers of allowing any encroachment whatsoever on this essential right.

Glasser v. *United States*, 315 U.S. 60, 86. Selecting a jury from a venire composed solely of individuals who have volunteered to sit on a major criminal case for an extended period of time is, we submit, a flagrant example of a "method other than a process which will insure a trial by a representative group * * *."

Traditionally, of course, as the court of appeals concluded, the focus in Sixth Amendment cases has been upon the *exclusion* from jury service of a definable group. E.g., *Ballard* v. *United States*, *supra* (Exclusion of women); *Avery* v. *Georgia*, 345 U.S. 559 (Exclusion of blacks). But to take such a narrow view of the Sixth Amendment's scope is unwarranted, for it has been recognized that "the disproportionate *inclusion* of a particular group" in the venire equally threatens the representative nature of the jury. 8 *Moore's Federal Practice*, ¶ 24.02[2]. Indeed, the two situations are but opposite sides of the same coin; a jury, for example, which deliberately excludes women can be said to improperly include men. Regardless of whether the vice is viewed as improper exclusion or inclusion, the government may not "subject a defendant to indictment or trial by a jury that has been selected in an arbitrary and discriminatory manner, in violation of the Constitution * * *." *Peters* v. *Kiff*, 407 U.S. 493, 502 (Opinion of Marshal, J.).

The arbitrary and discriminatory nature of selecting a jury by limiting its composition to those volunteers who desire to hear an extended criminal case then re-

ceiving national attention[10] is obvious. Those who volunteer may well be motivated by feelings of civic duty,[11] but they may as well be motivated by the desire to participate in a famous, and in some respects landmark, criminal case. Or they may be motivated by the desire to continue to receive their full salaries, if employed by the government which is prosecuting the case.

That it may not be easy to define the precise values lost, when the small minority who volunteer to serve[12] entirely compose the jury, does not mean that the method of jury selection is not improper. As the Court recently has concluded:

> It is in the nature of the practices here challenged that proof of actual harm, or lack of harm, is virtually impossible to adduce. For there is no way to determine what jury would have been selected under a constitutionally valid selection system, or how that jury would have decided the case.

Peters v. *Kiff*, *supra*, 407 U.S. at 504. And such an approach necessarily "deprives the jury system of the broad base it was designed * * * to have in our demo-

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[10] Although the trial court did not designate the case by name, the impending trial of Senator Brewster had received widespread media coverage, was imminent when the venire was asked if it wished to sit on an extended trial, and plainly the jurors could well have anticipated which trial the court was referring to.

[11] Although it would seem that having just completed a month of jury duty, most of the prospective jurors would be inclined to feel that they had fully exercised their civic responsibilities.

[12] When the trial court asked for volunteers, only sixty-eight veniremen accepted; between two and three hundred others declined to volunteer (App. 60).

cratic society." *Ballard* v. *United States, supra,* 329 U.S. at 195.

This Court has dealt on one prior occasion with the propriety of all-volunteer juries, and by the barest of majorities sustained the practice. *Frazier* v. *United States,* 335 U.S. 497.[13] There, as Justice Jackson put it in dissent (for himself and Justices Frankfurter, Douglas and Murphy), a substantial and long-standing "defect in the system" of jury selection existed because "when the panel of jurors was drawn, the court appears to have asked all those who did not wish to serve to step aside, and they were excused from serving." 335 U.S. at 516. As a result, "jury service is put on virtually a voluntary basis and qualified persons are allowed to decline jury service at their own option * * *." *Ibid.*

The dissenters then explained why such volunteer service necessarily distorted the composition of the jury, denying a defendant the impartial panel to which he is entitled by the Sixth Amendment:

> [I]n some jurisdictions [this method of selection] might produce no distortion of the composition of the panel; but is certain to do just that in the District of Columbia because of the dual standard and dubious method of jury compensation.

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[13] *Frazier* may well be factually distinguishable, for the Court was particularly concerned with the fact that the defendant had exercised his pre-emptory challenges to strike all the non-government employees on the prospective panel. 335 U.S. at 505-507. With regard to the method of selecting the jury, the Court majority concluded that the defendant had not established sufficient facts "to lay any foundation for valid attack upon the method followed in selecting the panel." 335 U.S. at 504. The majority therefore did not directly address the considerations raised by the dissent.

> The non-government juror receives $4 per day, which under present conditions is inadequate to be compensatory to nearly every gainfully employed juror. But the government employee is not paid specially; instead he is given leave from his government work with full pay while serving on the jury. The latter class are thus induced to jury service by protection against financial loss, while the former are subject to considerable disadvantage. This condition makes it obvious that, if jury service is put on virtually a voluntary basis and qualified persons are allowed to decline jury service at their own option, the panel will become loaded with government employees. If this undue concentration of such jurors were accomplished by any device which excluded non-government jurors, it unquestionably would be condemned * * * A system which has produced such an objectionable result and always tends to repeat it, should, in my opinion, be disapproved by this Court in exercise of its supervisory power over federal courts.

335 U.S. at 516-517. These problems the dissent in *Frazier* addressed are no less serious today, and may even be greater, for certainly those government employees who volunteer for jury service in major criminal trials involving the integrity of the government service itself cannot be wholly free from an interest in vindicating the service through a conviction.[14]

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[14] Given the procedural protections available to protect government employees from arbitrary dismissal, it seems more likely that the principal defect of including large numbers of volunteer government employes on juries in cases of this nature lies in the inevitable tendency to defend the integrity of government service by convicting the defendant. But since the government is paying the salaries of the jurors while they serve, it is also possible that "rational people could surely entertain the broad underlying premise that those dependent upon government for substantial income might be unsuitably conflicted if they served as jurors." *United States ex rel. Upton* v. *Nenna*, 318 F. Supp. 899, 904 (S.D.N.Y.).

Those who constitute a class that prefer not to serve on a jury for a major criminal trial are no less definable a category than, for example, wage earners, which "cannot be intentionally and systematically excluded in whole or in part without doing violence to the democratic nature of the jury system." *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217, 223. Though certainly less obvious a class than, for example, women, they likewise have "qualities of human nature" and "a distinctive medley of views," resting upon their reticence to involve themselves in such cases, that is surely "indispensable if the jury is to comprise a cross-section of the community." *Healy* v. *Edwards*, 363 F. Supp. 1110, 1115 (E.D.La.), probable jurisdiction noted, 415 U.S. 911.

There remains only the question of whether petitioner must demonstrate some specific prejudice in order to be entitled to a new trial.[15] The answer, we submit, is clearly no, for "reversible error does not depend on a showing of prejudice in an individual case." *Ballard* v. *United States*, *supra*, 329 U.S. at 195 (Jury excluded women). Therefore, "even if there is no showing of actual bias in the tribunal, this Court has held that due process is denied by circumstances that

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[15] The government argued in the court of appeals that petitioner had not objected to the method of jury selection. While the court of appeals expressly refused to reach that point (Pet. App. A, p. 15a), it fully dealt with the issue on the merits, and a fair reading of the transcript demonstrates that the objection was made and summarily overruled, precluding further discussion before the trial judge. In any event, plain and prejudicial error in the selection of the jury panel is reviewable even in the absence of a less than emphatic objection. Fed. R. Crim. Proc. 52; *United Brotherhood of Carpenters & Joiners of America* v. *United States*, 330 U.S. 395, 411-412; 8A *Moore's Federal Practice*, ¶ 52.03[2].

create the liklihood of the appearance of bias." *Peters* v. *Kiff*, *supra*, 407 U.S. at 502. Since the potential for harm that "is virtually impossible to" prove is so great, any doubt "should be resolved in favor of giving the opportunity for challenging the jury to too many defendants, rather than giving it to too few." *Id.*, at 504.[16]

2. This Court should also review the trial court's failure to grant petitioner a new trial when highly prejudicial, hearsay testimony was admitted against petitioner, and when the government's case rested upon the surprise testimony of a witness revealed to the defendant for the first time on the morning of the trial.

As indicated above (pp. 5-6), the government's principal witness was permitted to testify to a statement allegedly made by Senator Brewster that "back when I was a Congressman he [petitioner] tried to bribe me and I threw him out of my office" (App. 128). The court's cautionary instruction, that this testimony was only to be considered against Senator Brewster,[17] was subsequently ignored, both by the court and by the government, which in closing argument used this testimony against petitioner. It would be difficult to imagine a more damaging or prejudicial statement, in a trial for bribery of a public official, than

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[16] The volunteer system of jury selection used in this case is particularly indefensible because it was used for no other reason than to prevent a one-day delay in beginning the trial, already delayed for several years by Senator Brewster's appeal to this Court, so that the November complement of jurors would be available.

[17] As Judge Learned Hand once explained, a cautionary instruction is a "recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody's else." *Nash* v. *United States*, 54 F.2d 1006 (C.A. 2).

a statement allegedly made by that official that the defendant had tried to bribe him on a previous occasion.

It is a fundamental proposition of criminal jurisprudence that the defendant's guilt may not be shown by the establishment in the prosecution's case-in-chief of a propensity to commit the type of crime alleged. As this Court said in *Michelson* v. *United States*, 335 U.S. 469, the government

> may not show the defendant's prior trouble with the law, specific criminal acts, or ill names among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge.

Id., at 475-476; see McCormick, *Evidence* § 157 (1954 ed.). The use of Sullivan's hearsay, prejudicial testimony against petitioner simply cannot be permitted to contribute to petitioner's conviction.

In addition, we submit, the trial court erred in refusing to grant petitioner a continuance to meet the devastating testimony of Betsey Norton, previously supposed to be a minor government witness, who on the day of trial was revealed to the defense as providing testimony far beyond that suggested in the discovery memorandum agreed to by the government and petitioner (App. 41-51). The Court of appeals defense of this action, through a gratuitous reference to the able defense petitioner's counsel was able to conduct (Pet. App. A, p. 23a), hardly resolves this matter.

While the right to a continuance is "traditionally within the discretion of the trial judge," it is clear that "a myopic insistence upon expeditiousness in the face of a justifiable request for a delay can render the right to defend with counsel an empty formality * * * *". *Ungar* v. *Sarafite*, 376 U.S. 575, 589; *Chandler* v. *Fretag*, 348 U.S. 3; *White* v. *Ragen*, 324 U.S. 760. The right to assistance of counsel, conferred by the Fifth and Sixth Amendments, comprehends the right to adequate time for the preparation of a defense, inasmuch as "the denial of opportunity for * * * counsel to * * * consult with the accused and to prepare his defense" can render the employment or appointment of counsel "a sham and nothing more than a formal compliance with the Constitutional requirement * * *." *Avery* v. *Alabama*, 308 U.S. 444, 446; *Powell* v. *Alabama*, 287 U.S. 45.

Implicit in the right to adequate time for the preparation of a defense is the right to a reasonable continuance of the trial date to permit such preparation. For while

> the prompt disposition of criminal cases is to be commended * * * in reaching that result a defendant * * * must not be stripped of his right to have sufficient time to consult with counsel and prepare his defense. To do * * * [otherwise] is not to proceed promptly in the calm spirit of regulated justice but to go forward with the haste of the mob.

Powell v. *Alabama*, *supra*, 287 U.S. at 59. Therefore, "it is a denial of the accused's right to a fair trial to force him to trial with such expedition as to deprive him of the effective aid and assistance of counsel * * *." *White* v. *Ragen*, *supra*, 324 U.S. at 763-64.

Admittedly, "[s]ince the Constitution nowhere specifies any period which must intervene between the

* * * [employment] of counsel and trial", the bare fact "standing alone, that a continuance has been denied does not constitute a denial of the constitutional right to assistance of counsel * * *." *Avery* v. *Alabama*, *supra*, 308 U.S. at 446. Accordingly,

> there are no mechanical tests for determining when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly the reasons presented to the trial judge at the time the request is denied.

Ungar v. *Sarafite*, *supra*, 376 U.S. at 589. Here, the reasons presented to the trial court for the requested delay and the reasons expressed by the Court for its refusal of a continuance clearly show a manifest abuse by the Court in the exercise of its discretion.

Counsel made it abundantly clear to the court that the government's stunning disclosure, literally on the eve of the trial, of its intention to submit through Mrs. Norton startling new evidence against petitioner which it had newly developed through its conversations with her, caught the defense by surprise and rendered nugatory some vital portions of its trial preparation (App. 52-58, 89-93). Further, the nature of the evidence to be adduced from Mrs. Norton was not even fully disclosed until the very morning of the trial, thus effectively preventing defense counsel from investigating its accuracy and preparing an effective cross-examination to meet it.[18] In addition, the task

[18] The court of appeals' suggestion that because Betsey Norton testified during the second week of trial, petitioner's counsel could have used the first week to investigate her story (Pet. App. A, p. 22a), is frivolous on its face. Counsel was, at that time, fully engaged in defending petitioner, cross-examining other government witnesses as they were presented.

was further complicated by the fact that Mrs. Norton's own counsel had forbade her to discuss the case with defense counsel in the few hours prior to trial.

Given the crucial role of Mrs. Norton's testimony to the government's case, it is clear that fundamental fairness required at least a brief continuance to enable defense counsel to prepare for this newly-developed testimony. The Court's failure to allow that continuance constituted an abuse of its discretion, which this Court should rectify.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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